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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MEGAN D. et al., Persons Coming  
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ANTHONY D.,

Defendant and Appellant.

D047494

(Super. Ct. No. EJ2657 A & B)

APPEAL from orders of the Superior Court of San Diego County, Gary M. Bubis,  
Referee. Affirmed.

Anthony D., the father of Megan D. and Kylie D., appeals orders adjudicating his daughters dependents of the juvenile court and removing them from his custody. He claims the jurisdictional and dispositional orders were not supported by substantial

evidence, and the court did not consider lesser alternatives to their removal from his custody.

## PROCEDURAL AND FACTUAL BACKGROUND

In August 2004, Megan, 16, and Kylie, 10 (together the girls), began living with Anthony after the family court granted him custody because Megan was not attending school and was getting in trouble while living in her mother's home in Colorado.<sup>1</sup>

On August 15, 2005, when Anthony arrived home after work, he was met by Danielle G. and Heather P., two neighbors who wanted to discuss the girls' behavior. Megan's friend had brought cigarettes, and the girls, along with Danielle's 10-year-old daughter Kalie, smoked them. Megan also directed Kylie and Kalie to dance in a provocative manner. Megan and Kylie also had called Heather's children stupid and teased them about being in special education.

Confronted by Anthony with these accusations, Megan and Kylie denied them. Megan and Anthony engaged in "a shouting match." Anthony slapped Megan, pushed his knuckles into her face, and called her a "Fat Ass." Danielle and Kalie witnessed this, as did Kylie. Kylie said she saw a red hand print on Megan's face and heard Megan scream, "Why [did] you hit me in my face?" Kylie and Danielle also saw Anthony hit Megan with a belt. Megan did not have marks or bruises on her body, but her jaw was sore. Anthony struck Kylie on her arms and legs with a belt, and one of the blows caused her to fall. Kylie had a small bruise on her left thigh and a small bruise on her right thigh.

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<sup>1</sup> The mother is not a party to this appeal and will be discussed only when relevant to the appeal.

Two days later, Megan and Kylie told a social worker they were afraid of Anthony and expected him to retaliate against them for talking to her.<sup>2</sup> Kylie said Anthony hit her with a belt about three times a week. Anthony also disciplined Kylie by grounding her and making her write sentences or essays about her bad behavior. The social worker took the girls into protective custody and they were placed together in a foster home.

Anthony told the social worker that he did not strike the girls during the August 15, 2005 incident. He admitted he was angry and yelled at them when he learned they had friends in the home when he was not present, smoked cigarettes and danced in a provocative manner. Anthony said the girls had just returned from a visit with their mother in Colorado and every time they have contact with her, they make allegations against him because they want to live with their mother.

On August 22, 2005, the San Diego County Health and Human Services Agency (Agency) filed dependency petitions on behalf of Megan and Kylie, alleging Anthony subjected each of them to serious physical harm. (Welf. & Inst. Code, § 300, subd. (a).)<sup>3</sup> The petitions also contained a sibling abuse allegation. (§ 300, subd. (j).)

On August 31 and September 8, 2005, the girls told their social worker they did not want to visit Anthony. On September 8, the foster mother alerted the social worker

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<sup>2</sup> There had been two previous child abuse referrals involving Anthony's use of a belt on Megan and Kylie. The girls said Anthony had punished them for talking to the social workers by grounding them and refusing to talk to them. After one of the referrals, Anthony hit both girls with the belt.

<sup>3</sup> All statutory references are to the Welfare and Institutions Code.

that she twice caught Megan lying, once about cheerleading practice and the other about her aunt giving her money.

Anthony told the social worker that he spanked the girls with his hand and a belt. He denied leaving marks on them. Anthony said he would no longer spank them with a belt.

On September 17, 2005, Megan and Kylie were detained in the Riverside County home shared by the maternal grandparents and the maternal great aunt. On October 14, the maternal aunt told the social worker that Megan lied about a student committing suicide at her school.

The contested jurisdictional/dispositional hearing was held October 21 and October 28, 2005. Anthony, testifying by telephone, denied pushing Megan's face and hitting her with a belt. Anthony also denied striking Kylie with the belt and causing the bruises on her legs. Anthony said that on August 15 he displayed the belt as a scare tactic to motivate the girls to tell the truth. Anthony admitted using a belt to "tap" Megan and Kylie a year ago. A social worker told Anthony that he should not use a belt to impose discipline and he had not done so since then.

Anthony denied his neighbor Danielle saw him hit Megan and Kylie with a belt. Anthony said Danielle was irate when she left and hollered, "you are going down."

Jeanetta N., Anthony's girlfriend, testified that when she arrived at his apartment on August 15, 2005, it was a chaotic scene with the neighbors, Anthony and Megan shouting and Kylie crying. Anthony was in the living room, holding a belt and asking Megan to sit down; Megan stood in the doorway of her bedroom, yelling, "why are you

hitting me daddy? I don't have to sit down." Jeanetta asked Anthony why he was holding a belt and asked Megan why she was yelling. Anthony said the girls had been lying and smoking and then he placed the belt on the couch. Jeanetta, who stated the girls never left her sight while she was in the apartment, did not see Anthony hit Megan or Kylie with the belt.

Jeanetta, who had known Megan since 1994, described Megan as "untruthful" and said Kylie "can be untruthful." As an example of Megan's untruthfulness, Jeanetta cited the time "she told child protective services that I was abusing her and her sister." Megan later apologized to her for the false accusation. According to Jeanetta, Megan lied so often it was difficult to keep track of all her lies. "It is hard to keep a count of somebody [who] is lying on a daily basis consistently."

Other witnesses cast doubt on Megan's honesty, including her former best friend,<sup>4</sup> the friend's mother and Heather, one of the neighbors present during the August 15, 2005 incident. Heather said Megan lied about having a child. Heather, who on August 15, 2005, sat on the couch and had a direct view into Megan's bedroom, also testified that she did not see Anthony hit, touch, or push Megan. When Megan jerked her head back and said Anthony had hit her in the face, Anthony said, "No, I did not. Don't sit there and lie." According to Heather, Anthony's "hands were there by his side. The whole time his hands didn't move."

Megan testified that on August 15, 2005, Anthony hit her legs with a belt and used an open hand to shove her in the face before nudging his knuckle into her face. Anthony

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<sup>4</sup> The parties accepted the stipulated testimony of the former best friend.

also hit Kylie twice on the leg with the belt. According to Megan, Anthony previously struck Kylie and her with a belt and also made them write sentences or an essay. Megan initially lied to Anthony about what happened in their home on August 15 because she was "afraid of what was going to happen." Megan acknowledged lying to Anthony at other times "because even if I told the truth, I'd still get the punishment that I'd get if I was lying." Megan admitted lying to her great grandparents, foster mother, aunt and social worker. Megan said she lied because she was "so used to it."

Megan testified that after she spent one week at Polinsky Children's Center in 1994, Anthony stopped disciplining her with the belt for "a month or two" and promised to "do the right thing, but it always ends up backfiring and turning into the same thing it was before."

At the conclusion of the trial, the court made a true finding on the section 300, subdivisions (a) and (j) allegations and sustained the petitions. The court found Megan a "very credible witness on the stand" even though it was "clear that Megan lies. She lies about people trying to commit suicide, having babies, going to cheer leading practice. But one thing that is different in this case is that she didn't start this lie." The court noted that Megan did not bring the case to the attention of the authorities by reporting the abuse by Anthony; Agency learned about the incident from others and went to the home and interviewed Megan. The court found unconvincing Anthony's assertions that Megan and Kylie agreed to lie to be removed from his home and placed with their mother. "[I]f that's the motive for lying, it has failed miserably, and these girls have not recanted

because they are not living with their mother." The court also discounted Anthony's evidence that he and the girls were "a very happy family."

The court declared Megan and Kylie dependents of the court and ordered them removed from Anthony's custody based on the "same evidence I used to find jurisdiction." The court placed the girls with a relative.

## DISCUSSION

### I. *Jurisdictional Finding*

Anthony contends the juvenile court erred in sustaining the petitions under section 300, subdivision (a) because there was insufficient evidence that he inflicted serious physical harm on Megan and Kylie.

In a dependency proceeding, the child welfare agency must prove by a preponderance of the evidence that the child who is the subject of the petition comes under the court's jurisdiction. (§ 355; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; *In re Amy M.* (1991) 232 Cal.App.3d 849, 859-860.) We review the evidence most favorably to the juvenile court's order – drawing every reasonable inference and resolving all conflicts in favor of the prevailing party – to determine if it is supported by substantial evidence. (*In re Shelly J.* (1998) 68 Cal.App.4th 322, 329.) If it is, we affirm the order even if other evidence supports a contrary conclusion. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) The parent has the burden of showing there is insufficient evidence to support the order. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

Section 300, subdivision (a), provides that jurisdiction may be assumed if the child has suffered, or there is substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally by the child's parent. The court may find there is substantial risk of serious future injury based on the manner in which a less serious injury was inflicted.

The evidence in support of jurisdiction under section 300, subdivision (a) included the social worker's reports outlining the girls' accounts, neighbor Danielle's testimony that on August 15, 2005, Anthony used a belt to punish the girls and Megan's trial testimony. On appeal, Anthony contends the evidence was insufficient to support the petitions because the truth of the allegations relied on the statements of Megan, who was shown to be mendacious. Anthony also claims the evidence was insufficient to establish the girls suffered injuries rising to the level of serious physical harm contemplated under section 300, subdivision (a).

We are not persuaded by Anthony's arguments. The court, as the trier of fact, found Megan was "very credible," noting she withstood extensive cross-examination. We cannot reweigh the evidence, second-guess the trial court's credibility evaluations, or substitute our judgment for that of the trial court, which observed and heard the live testimony. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

The evidence of Megan's tender jaw, Kylie's bruises, and Anthony's use of the belt on August 15, 2005, by itself might not have justified a finding the girls suffered serious physical harm or were at substantial risk of future serious harm. Under these circumstances were there no evidence to suggest Anthony's excessive discipline was



likely to recur, his point about the non-serious nature of the injuries might have merit. However, that is not this case. The girls had been living with Anthony for one year, and the August 15 incident was the third referral received by Agency for disciplining them with a belt. The court may consider past conduct as well as present circumstances. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The court could reasonably believe Anthony's acts would reoccur absent court intervention.

Moreover, it is appropriate for a juvenile court to consider a parent's level of denial in determining the risk to the child if placed with that parent. (See *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044.) A parent need not agree with a false accusation of abuse and should not be punished for attempting to explain why he or she was wrongfully suspected of abuse. The court may, however, conclude that a parent's denials reflect an underlying resistance to the treatment needed to effect the behavior changes that will ensure the child's safety. (*Ibid.*) The juvenile court was in the best position to weigh the significance of Anthony's refusal to accept responsibility for Kylie's bruises in considering whether there was a substantial risk of future serious injury. Further, following the previous two referrals, Anthony punished the girls for talking with the social worker.

We conclude substantial evidence supports the court's assumption of jurisdiction of the girls under section 300, subdivision (a).

## II. *Dispositional Order*

Anthony contends there was insufficient evidence to support the removal of Megan and Kylie from his custody.

After the juvenile court finds a child to be within its jurisdiction, the court must conduct a dispositional hearing. (*Cynthia D. v. Superior Court, supra*, 5 Cal.4th at p. 248; *In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1701.) At the dispositional hearing, the court must decide where that child will live while under the court's supervision. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1082.)

A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60.) "The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child." (*In re Diamond H., supra*, 82 Cal.App.4th at p. 1136.) The court may consider a parent's past conduct as well as present circumstances. (*In re Troy D.* (1989) 215 Cal.App.3d 889, 900.)

Before the juvenile court issues a removal order, it must find the child's welfare requires removal from parental custody because of a substantial danger, or risk of danger, to the child's physical health if returned home, and there are no reasonable alternative means to protect the child. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654; § 361,

subd. (c)(1).<sup>5</sup> To remove a child from his or her parent's custody, there must be clear and convincing evidence that removal is the only way to protect the child. (See, e.g., *Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 248.)<sup>6</sup>

Whether the conditions in the home present a risk of harm to the children is a factual issue. On review, we decide whether substantial evidence supports the juvenile court's determination – considering the heightened burden of proof – that the evidence mandated Megan's and Kylie's removal from Anthony's custody. (*In re Kristen H.*, *supra*, 46 Cal.App.4th at p. 1654.)

We conclude substantial evidence supports the court's order removing Megan and Kylie from Anthony's custody under section 361, subdivision (c)(1). We have determined that substantial evidence supported the jurisdictional allegations found true under section 300, subdivision (a) – including the girls were at substantial risk of serious

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<sup>5</sup> Section 361, subdivision (c)(1), reads in pertinent part: "A dependent child may not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated unless the juvenile court finds clear and convincing evidence of any of the following: [¶] (1) There is . . . a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parents' . . . physical custody. . . . The court shall consider, as a reasonable means to protect the minor, the option of removing an offending parent . . . from the home. The court shall also consider, as a reasonable means to protect the minor, allowing a nonoffending parent . . . to retain custody as long as that parent . . . presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm."

<sup>6</sup> The heavier burden of proof at the dispositional stage of dependency proceedings is intended to protect the fundamental right of a parent to retain custody of a child. (*In re James T.* (1987) 190 Cal.App.3d 58, 65.)

physical harm if left in Anthony's custody. Anthony had a history of using a belt to impose discipline, and a social worker previously had told him this was an inappropriate way to discipline the girls. Although Anthony vehemently denied he used a belt on the girls on August 15, 2005, he admittedly had a belt in his hand and was observed striking Kylie with it by Megan and another witness. Afterward, Kylie had two otherwise unexplained bruises. The court found Megan credible. Further, Anthony had punished the girls for talking to a social worker after previous referrals concerning his use of the belt to discipline them. The court reasonably could infer that Anthony was either unwilling or incapable of changing his methods of discipline or parenting without court intervention. The record contains substantial evidence there was a substantial danger or risk of danger to Megan's and Kylie's physical health if they were returned to Anthony's custody at that time.<sup>7</sup>

Anthony relies on *In re Jasmine G.* (2000) 82 Cal.App.4th 282. That case is distinguishable because (1) the parents had started services, (2) the parents had renounced corporal punishment and expressed remorse for using it in the past, (3) the child was not afraid of her parents and wanted to return home, and (4) the child's therapist testified it would be "totally" safe to allow her to return home. (*Id.* at pp. 288-289.) Here, Anthony had not started services and had not shown remorse for physically abusing Megan and

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<sup>7</sup> Anthony complains that the court did not state a factual basis for the removal order as required by section 361, subdivision (d). The record, however, shows the court did state a factual basis in making the dispositional orders by noting it was "using the same evidence [it] used to find jurisdiction." The court also explicitly made the dispositional order by clear and convincing evidence as required by law. In any event, any error in this regard is harmless. (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1137.)

Kylie; instead, Anthony minimized his use of the belt and denied any responsibility for the August 15, 2005 incident, labeling the girls liars. Moreover, Megan and Kylie feared Anthony, were worried he would punish them for speaking to the social worker, and did not want to live with him.

Anthony also asserts that the court did not consider lesser alternatives to removing the girls as required by section 361, subdivision (d).

To justify removal from a parent's custody, there must be substantial evidence to show it is necessary to ensure the safety of the child. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) There was sufficient evidence to show both an "identified, specific hazard" (*ibid.*, italics omitted) to Megan and Kylie if the girls were not removed, and less intrusive alternatives to removal were not possible until Anthony made progress on his case plan and the danger was lessened or eliminated. The girls repeatedly said they feared Anthony and did not want to live with him. Megan said Anthony regularly abused her emotionally and physically, remarking at one point that this happened "[e]very time I get in trouble, which is pretty much every other day." Anthony, on the other hand, denied abusing the girls. The prior referrals had not been effective in reducing the danger.

Here, the juvenile court amended Anthony's case plan to include individual therapy and ordered individual therapy "immediately" for Megan and Kylie to facilitate eventual conjoint therapy that would be necessary before Anthony could reunify with the girls. The court observed:

"I am not sure they are ready to sit down after this huge contested hearing where the father basically puts on all this evidence [of] what

a liar his daughter is. She's going to potentially hear about this and now they are going to sit in a room and get along just fine without any individual therapy[?]

"I doubt it.

"There is a lot of insecurity here. . . . But I need to know that she is somehow ready to sit down [in conjoint therapy] and face the person that she says abused her, [and who] said I didn't do any of that. . . . [T]hat's some pretty heavy family dynamics.

"I don't think we are ready to jump into that right now. . . . But I want them engaged in therapy as soon as possible so we can start conjoint therapy as soon as possible."

In deciding whether to remove a child from home, the child's best interests are paramount. (*In re Corey A.* (1991) 227 Cal.App.3d 339, 346-347.) "The juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accordance with this discretion." (*In re Jose M.* (1988) 206 Cal.App.3d 1098, 1103-1104.) We discern no abuse of discretion in this case.

#### DISPOSITION

The orders are affirmed.

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McDONALD, J.

WE CONCUR:

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HALLER, Acting P. J.

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IRION, J.